Supreme Court, U.S.
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No. 01-1827

In The
Supreme Court of the United States

E. JOSEPH FACE, JR., ET AL.,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF FLORIDA, COLORADO, DELAWARE, ILLINOIS, INDIANA, MISSISSIPPI, NEVADA, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VERMONT AND THE TERRITORY OF THE NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The Fourth Circuit's decision in this case stands for the proposition that plaintiffs may recover substantial attorney's fee awards against a State pursuant to 42 U.S.C. § 1988, where the cause of action is based solely on Commerce Clause preemption of an otherwise valid state law. This places State officials in the untenable position of choosing between not doing their duty to enforce state law where there is potential federal preemption under the Commerce Clause, or subjecting their state to a substantial money judgment award of attorney's fees for enforcement of state law, which may be subsequently preempted by federal law. The threat of these judgments not only interferes with the sovereign duties and responsibilities of state officials, but also constitutes a potentially serious impact on the States' treasuries. For these reasons, the *amici* States have a direct interest in question one of the petition and submit that the decision of the Fourth Circuit violates the States' sovereign immunity under the Eleventh Amendment.

REASONS TO GRANT THE PETITION

I. THE COURT'S RECENT SOVEREIGN IMMUNITY JURISPRUDENCE BEGINNING WITH *SEMINOLE TRIBE V. FLORIDA* HAS SUBSTANTIALLY ERODED THE COURT'S RULINGS IN *HUTTO* AND *JENKINS*.

Like numerous other lower courts, the Fourth Circuit relied on this Court's decisions in *Hutto v. Finney*, 437 U.S. 679 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), to affirm an attorney's fees award under § 1988 against a State's officials, even though the State was not alleged to have violated the Fourteenth Amendment. That reliance is understandable, given the broad language used by the Court in *Hutto* and *Jenkins* to permit the award of attorney's fees in those cases. But both decisions were issued when this Court permitted the States' sovereign immunity to be overcome readily. Moreover, both cases addressed the consequences of Fourteenth Amendment violations by States, meaning neither squarely addressed whether a State must pay attorney's fees under § 1988 after losing a case brought to enforce Article I of the Constitution.

The Court's recent sovereign immunity decisions, beginning with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), establish that Congress lacks the power to subject the States to money judgments payable to private parties in non-Fourteenth Amendment cases. The broad reasoning of *Hutto* and *Jenkins* - which accepted Congress's designation of attorney's fees as costs, and hence as ancillary to prospective relief allowable under Ex parte Young- is, therefore, no longer tenable. Congress cannot use such sleight of hand to negate the States' sovereign immunity.

The impact of this loophole to the State's sovereign immunity is substantial. In numerous instances, States have been forced to pay hundreds of thousands of dollars in attorney's fees to private parties because the State defended, in good faith, a law

or regulation that was found to be preempted by Article I legislation or found to have violated the dormant Commerce Clause law. Because the Court maintains the exclusive authority to overrule its cases where their rationales have been rejected but their holdings remain applicable, *Agostini* v. *Felton,* 521 U.S. 203, 237 (1997), only this Court can remedy the situation. Certiorari should be granted to revisit *Hutto* and *Jenkins* or limit their application to Fourteenth Amendment cases.

A. *Hutto* and *Jenkins*

Both *Hutto* and *Jenkins* involved Fourteenth Amendment rights. Although the majority in *Hutto*, as well as the four dissenting Justices, gave serious consideration to the application of the Eleventh Amendment, ultimately *Jenkins* discounted the relevance of that amendment.

In *Hutto*, Arkansas officials were held liable for violating inmates' Eighth Amendment rights, as incorporated through the Fourteenth Amendment. The Court of Appeals assessed the officials with appellate attorney's fees under § 1988, and the officials argued to this Court that Arkansas's Eleventh Amendment immunity barred the award because Congress had not clearly abrogated States' immunity through the statute's language.

The Court rejected that argument. The Court first explained that, under *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Congress had plenary power to set aside States' Eleventh Amendment immunity to enforce the Fourteenth Amendment, and that the legislative history behind § 1988 revealed Congress's intent to exercise that authority by adopting the statute. 437 U.S. at 693-95. Next, the Court observed that Congress designated attorney's fees under § 1988 to be "part of the costs" awarded prevailing parties and that costs had previously been imposed on States "without regard for the States' Eleventh Amendment immunity." *Id.* at 695-98. In footnotes, the Court characterized costs as expenses incurred in seeking prospective relief, and the Court mused that an award of

costs, including fees, "could hardly" create enormous fiscal burdens on the States. *Id.* at 695-97 nn.24, 27.

Noting that attorney's fees were regularly taxed as an item of costs in England, while not in America, the Court then stated that Congress had at various times designated fees as costs, and the Court identified a single case where it had imposed those costs on a State, including fees, without objection. *Id.* at 696 (citing *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927)). From this, the Court concluded, "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Id.* at 698.

Four justices dissented from these conclusions. In his partial dissent, joined by Chief Justice Burger and Justice White, Justice Powell asserted that Congress's failure to include an express abrogation of States' Eleventh Amendment immunity in § 1988 precluded a finding of any such abrogation. Justice Powell further contended that this failure could not be excused by Congress's designation of fees as costs or simply because Congress acted under § 5 of the Fourteenth Amendment, rather than some other authority. *Id.* at 704-10. In a separate dissent, then-Associate Justice Rehnquist joined this portion of Justice Powell's partial dissent and further questioned whether Congress's § 5 authority to abrogate States' immunity extended to Eighth Amendment violations. *Id.* at 717-18.

Eleven years later, in *Missouri v. Jenkins*, the Court considered Missouri's appeal from a § 1988 attorney's fees award in a school desegregation case under Title VII of the Civil Rights Act of 1964. Missouri argued that case law subsequent to *Hutto* confirmed that Congress must expressly abrogate States' Eleventh Amendment immunity in the relevant statute and that this had not occurred in the case of § 1988 and Title VII. Missouri also argued that *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which disallowed an interest award under § 1988 against the Federal Government because Congress did not expressly abrogate the Federal Government's sovereign

immunity, demonstrated that States also could not be assessed interest on an attorney's fees award.

Jenkins relied on *Hutto* to reject both arguments. The Court characterized *Hutto* as utilizing a distinction previously drawn in *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ex parte Young*, 209 U.S. 123 (1908), between "retroactive monetary relief" and "prospective injunctive relief," with attorney's fees awards belonging to the latter category because they offer only reimbursement for expenses incurred in seeking prospective relief. 491 U.S. at 278-79. From this, *Jenkins* concluded that *Hutto* had removed attorney's fees from the ambit of State's Eleventh Amendment immunity and that express abrogations of that immunity were thus unnecessary in statutes awarding attorney's fees against States. *Id.* at 279-84. The Court summed its holding in this short statement: "[T]he Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State." *Id.* at 284.

B. *Seminole Tribe* and Its Progeny

Since the Court decided *Hutto* and *Jenkins*, its view of the nature of States' sovereign immunity has changed significantly.

During the time between the Court's decisions in *Hutto* and *Jenkins*, the Court held a weak view of States' immunity as sovereigns. For instance, just four days before the Court decided *Jenkins*, the Court held that Article I's Commerce Clause affords Congress the power to abrogate States' Eleventh Amendment immunity. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* suggested, by implication, that numerous other sources of congressional power likewise permitted Congress to abrogate States' immunity. Similarly, the Court's earlier decision in *Parden v. Terminal Railroad of Alabama Docks Department*, 377 U.S. 184 (1964), held that States could constructively waive their sovereign immunity by participating

in activities identified by Congress as requiring a waiver of States' Eleventh Amendment immunity.

Thus, at the time of *Hutto* and *Jenkins*, the Court looked upon States' inherent immunity as a narrow concept, rooted in the Eleventh Amendment and subject to defeasement at the will of Congress. The Court's 1996 decision in *Seminole Tribe*, however, overruled *Union Gas* and firmly fixed the Court on the route to strengthening State's status as sovereigns. *Seminole Tribe* held that nothing in Article I of the Constitution empowers Congress to abrogate States' Eleventh Amendment immunity and that only the Fourteenth Amendment has been properly held to contain such a grant of authority.

Subsequent cases further expounded the nature of States' immunity. The Court clarified that States' sovereign immunity is a basic feature of statehood that predated and was preserved by the Constitution, neither defined nor limited by the Eleventh Amendment, and that except when Congress properly utilizes its enforcement authority under § 5 of the Fourteenth Amendment, Congress must treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

In addition, the Court overruled *Parden* and held that Congress may not circumvent its inability to abrogate States' sovereign immunity by declaring that States' participation in various activities constitutes a constructive waiver of their immunity. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Later cases have further defined the substantial dignity accompanying States' sovereign status and the concomitant limitations on Congress's powers over the States. *E.g.*, *Federal Maritime Comm'n*, 122 S. Ct. 1864 (2002) (holding Congress may not abrogate States' sovereign immunity in administrative proceedings); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding Congress could not abrogate States' sovereign immunity for claims under Title I of

the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (same for claims under the Age Discrimination in Employment Act).

C. The Undermining of *Hutto* and *Jenkins*

The fundamental restatement of the balance of power between the States and the Federal Government that the Court achieved through *Seminole Tribe* and its progeny has significantly undermined the rationales espoused by the Court in *Hutto* and *Jenkins*. This may be seen in at least two principal respects.

First, the Court has now placed tremendous emphasis on the dignity that accompanies States' status as sovereigns. *Alden*, 527 U.S. at 748 ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."). This theme is found in *Seminole Tribe* and echoes in the Court's subsequent cases, such as *College Saving Bank*, where the Court held Congress may not circumvent its inability to abrogate States' sovereign immunity by employing a legal fiction. To conclude, however, that attorney's fees do not touch upon States' sovereign immunity on the theory, expressed in *Hutto*, that such amounts are insubstantial and thus constitutionally inconsequential, or the theory, expressed in *Hutto* and *Jenkins*, that Congress has simply deemed attorney's fees the equivalent of court-imposed costs of a judicial proceeding, is, in either case, to employ a fiction that wholly ignores the dignity due States as sovereigns.

To begin, by no means are attorney's fees awards necessarily insubstantial. They may total hundreds of thousands (as they probably will in Virginia's case) or, conceivably, even millions of dollars. *See* Point II, *infra*. Sovereign immunity is intended to protect States' treasuries from intrusions by private persons and to ensure that States themselves, not Federal Courts or private citizens, determine how States' financial resources

should be allocated. *See, e.g., Alden*, 527 U.S. at 751. Surely that concern should encompass attorney's fees judgments that may entail six- or seven-figure awards. It is inexplicable that sovereign immunity permits attorney's fees awards in these amounts but bars a $10 claim for compensatory damages.

Furthermore, neither the States nor the federal courts view attorney's fees as a generally taxable cost of a judicial proceeding. *See, e.g., Buckhannon Rd. and Care Home, Inc. v. West Va. Dep't of Health and Human Resources*, 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees--the prevailing party is not entitled to collect from the loser."). Thus, only Congress's act of denominating fees as costs in § 1988 results in States being subject to judgments for attorney's fees. States' dignity as sovereigns should not be subjected to such linguistic machinations. Congress should not be permitted to cloak attorney's fees with the title "costs" just as it should not be permitted to cloak any form of compensatory damages as "costs."

A second and related means by which *Seminole Tribe* and its progeny have undermined *Hutto* and *Jenkins* lies in the recently established principle that Congress lacks the authority to abrogate States' sovereign immunity except with respect to its enforcement authority under § 5 of the Fourteenth Amendment. *Hutto* involved Fourteenth Amendment violations, and the decision placed tremendous emphasis on Congress's ability and intent to abrogate States' immunity in that context and impose the fee awards that were at issue in the case. That Congress *could* impose the attorney's fees award in *Hutto* reduced the immunity issue to a question of whether Congress did so properly, and this undoubtedly affected the analysis the Court undertook when it concluded both that Congress had done so properly *and*, largely in a footnote, that attorney's fees lie outside the scope of States' immunity.

The Court's mistaken view of Congress's authority likely affected *Jenkins* as well, which also involved Fourteenth

Amendment violations. There, without considering whether Congress took the proper steps to abrogate States' immunity, the Court simply followed the portion of *Hutto* that declared attorney's fees beyond the scope of States' immunity.

The *Jenkins* court could not have foreseen this decision's impact. Especially since the Court had decided *Union* Gas only four days earlier, the *Jenkins* court could not know that holding attorney's fees outside the scope of States' sovereign immunity would impact cases, such as the present case, where Congress completely lacks the constitutional authority to abrogate that immunity. The *amici* States believe that, were the Court to revisit this matter in light of *Seminole Tribe* and its progeny, the Court would appreciate that holding attorney's fees outside States' sovereign immunity permits them to be imposed where Congress entirely lacks the power to abrogate that immunity. In light of this, the *amici* States believe that the Court would greater scrutinize the merit, or lack of merit, of that position.

In sum, the Court's recent sovereign immunity jurisprudence has undermined the foundation on which *Hutto* and *Jenkins* rest. Accordingly, the *amici* States urge the Court to grant the requested writ of certiorari and revisit the Court's decisions in those two cases.

II. CONTRARY TO *HUTTO*'S SUPPOSITION, ATTORNEY'S FEES JUDGMENTS PLACE SUBSTANTIAL BURDENS ON STATES.

Hutto expressed the view that attorney's fees, together with traditionally taxable costs, "could hardly" impose enormous fiscal hardships on a State, and the Court appeared to suggest that its analysis might be otherwise were that not the case. 437 U.S. at 697 n.27. Over two decades later, that view has proven not to be the case. Furthermore, attorney's fees are being awarded in cases where the States' efforts to protect the well-being of their citizens have innocently crossed the boundary between the States' sphere of governance and that of Congress.

In all likelihood, this situation was not apparent to the Court in *Hutto* and *Jenkins*, and for this additional reason, the Court should grant the requested writ of certiorari in this case and revisit the decisions in these cases.

"[T]he public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating 'it is not a tort for government to govern.'" *Scheuer v. Krause*, 416 U.S. 232, 242 (1974) (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (dissenting opinion)). Justice Jackson's apothegm remains true today. Nevertheless, while it may be no sin for government to govern, a heavy penance is currently being exacted in the form of attorney's fees from States whose only intent in exercising their governmental power is to protect the health, safety and well-being of their citizens.

The apportionment of power under the Constitution allows both the Federal Government and the States to regulate commerce, and it has long been established that in the exercise of their police power States may act concurrently with the Federal Government in many areas of commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Wherever States' exercise of this authority touches upon interstate commerce, however, States risk two particular pitfalls that may give rise to private actions under 42 U.S.C. § 1983.

First, a State's regulatory acts may be found to conflict with federal law enacted by Congress under its Article I powers. As in the case now before the Court, the federal law at issue has typically been enacted under Congress's Commerce Clause authority, and, regardless, if that law affords persons federal rights, then they may bring a claim under § 1983 to remedy a State's violation of those rights. *See Golden State Transit. Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). Second, a State's regulatory acts may be found to violate the dormant aspects of the Commerce Clause by impermissibly burdening interstate commerce, and private persons may bring a claim under § 1983

to remedy such violations. Such claims have only been viable since this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), where the Court held that the Commerce Clause provides persons with federal rights that are enforceable under § 1983.

In both cases, this Court's decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), permit attorney's fees awards against States' officials under 42 U.S.C. § 1988 as part of the "costs" of obtaining relief. As a result, the risk of attorney's fees awards now exists whenever States' engage in economic regulation for the benefit of their citizens' health, safety, and welfare.

Such exposure has had serious consequences, the most obvious being the potential fiscal impact of attorney's fees awards. Fee awards can be very high. Typical plaintiffs in these cases are corporations or trade associations that employ high-priced counsel. Their fees may easily reach hundreds of thousands of dollars and could conceivably reach millions of dollars.

For example, in *Environmental Technology Council v. State of South Carolina*, 215 F.3d 1318 (4th Cir. 2000), the plaintiff challenged South Carolina's restrictions on the treatment and disposal of hazardous waste generated in other states. The court awarded fees of $486,489.42. In *Owner-Operator Independent Drivers Association v. Bissell*, 210 F.3d 595 (6th Cir. 2000), the court awarded a truck drivers' trade association, which sued Tennessee, $515,700 in attorneys' fees for litigating claims arising under the Commerce Clause and other constitutional provisions.

Florida may face fees as high or higher in a case now on appeal in the Eleventh Circuit. *See Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001), *appeal pending*, Case No. 02-10333-C, Eleventh Circuit Court of Appeals. In that case the Attorney General of Florida began an antitrust civil investigation of Major League Baseball after it proposed to eliminate two major league teams and leave the Florida market unless a new taxpayer-financed stadium were

built for the Florida Marlins. Major League Baseball filed suit under § 1983 to enjoin the investigation and the district court found that Major League Baseball had a constitutional right under the Commerce Clause not to be investigated. The two law firms representing Major League Baseball have claimed over 1,525 hours of work in a roughly five-month period, and the appeal is by no means concluded. If it is lost, fees in the case will likely exceed $500,000.

States can ill afford such outlays. Fee awards of such magnitude have a very serious impact on limited state budgets. An award of $500,000 or more in a single case that is to be paid out of the budget of a typical State's attorney general's office would seriously impair the ability of that office to perform its many responsibilities. Moreover, where economic regulation is at issue, as in the instant case, the prospect of what amounts to a hefty fine for a mistaken view of the reach of federal law can serve only to discourage States' willingness to address economic and consumer problems with appropriate and perhaps novel legislation. Though attorney's fees may be characterized in § 1988 as merely part of the "costs" of obtaining relief, the States' treasuries are no less depleted than if retroactive, compensatory damages were awarded, and the States' desire and ability to employ their police power for the benefit of their citizens are no less chilled. No matter what terminology is used, the practical effect of such awards is no different than that of any money judgment for damages.

Furthermore, the threat of a judgment for substantial attorney's fees can place States' officials in an untenable constitutional quandary. On the one hand, a State official may be duty-bound to follow state law and in good faith believe that law to be constitutional. Yet, on the other hand, the official may not be willing or able to risk a substantial monetary award in the form of attorney's fees if the official is later found to be incorrect. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 608 (2001) (noting such consequences of attorneys' fees awards).

In sum, fee awards are a heavy burden to bear for what Justice Kennedy has termed "a State's quite innocent but mistaken judgment respecting the shifting boundary between two sovereign powers." *Dennis v. Higgins*, 498 U.S. 439, 451 (1991) (Kennedy, J., dissenting). Because of the substantial impact created by imposing attorney's fees on States in cases outside the context of the Fourteenth Amendment, such as cases involving violations of Congress's Article I authority, the *amici* States urge the Court to grant certiorari to review the attorney's fees award in this case.

CONCLUSION

For all of the foregoing reasons, and with respect to the first question presented in Virginia's Petition for Writ of Certiorari, the Court should grant the requested writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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